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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-272

THOMAS LLOYD SCRUGGS - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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IN THE

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No. _____

THOMAS LLOYD SCRUGGS - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

The Petitioner, Thomas Lloyd Scruggs, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Kentucky, entered on May 23, 1978.

OPINION BELOW

The opinion of the Supreme Court of Kentucky affirming Petitioner's conviction was filed on April 11, 1978 and is reported in *Scruggs* v. *Commonwealth,* Ky., 566 S. W. 2d 405 (1978). It is attached herewith as Appendix "A." The order of the Supreme Court of Kentucky denying a Petition for Rehearing was entered on May 23, 1978. It is attached herewith as Exhibit "B." The mandate in Petitioner's case was entered by the Supreme Court of Kentucky on May 23, 1978.

JURISDICTION

The opinion of the Supreme Court of Kentucky was rendered on April 11, 1978. Petitioner's timely Petition for Rehearing was denied on May 23, 1978. The mandate of the Supreme Court of Kentucky was issued in Petitioner's case on May 23, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

I.

Did the Error in Not Allowing the Accused to Cross-Examine a Key Witness as to His Motive for Testifying Not Contribute to the Verdict Obtained Beyond a Reasonable Doubt?

II.

Does the Holding of the Supreme Court of Kentucky That the Trial Court's Error in Not Allowing the Accused to Call a Corroborating Witness to Testify Was Not Prejudicial Conflict With the Accused's Constitutional Right to Present a Defense?

III.

Did the Prosecutor's Argument to the Jury That the Accused Had Entertained the Thought of Pleading Guilty Prejudicially Violate His Rights to Due Process and Confrontation?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Sixth and Fourteenth Amendments to the Federal Constitution and more specifically the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment.

CRIMINAL RULE INVOLVED

The provision of the Kentucky Rules of Criminal Procedure involved is RCr 9.48, Separation of Witnesses:

> If either a defendant or the commonwealth requests it, the judge may exclude from the hearing or trial any witness of the adverse party not at the time under examination, so that he may not hear the testimony of the other witnesses. This provision shall not apply to the parties to the proceedings.

STATEMENT OF THE CASE

Thomas Lloyd Scruggs was tried and convicted in the Allen Circuit Court for the murder of his wife, Martha. During the course of the marriage, Martha had frequently found pleasure with her paramour, Jerry Fann. On December 3, 1975, the petitioner dropped her off at Weaver's house and she was not seen thereafter until her body was found in a cave on Fann's property on December 14, 1975.

During the course of the trial, the Commonwealth called as its chief witness, Jerry Fann. It was Fann

who led the police to the victim's corpse. Fann led the police to a tree that had been split by a shot from a high-velocity weapon. Fann found the spent shell casings. Fann's gun was determined to be the murder weapon and it was found in his possession with blood on it. Fann was the victim's lover. During the course of the cross-examination of Fann, petitioner's attorney tried to challenge Fann's motive for his testimony by inquiring into Fann's relationship with Martha:

> Q. 15. Have you had sexual relations with Martha Louise Scruggs?
> Mr. Secrest: Object.
> A. 15. Yes, sir.
> Mr. Secrest: It is immaterial of this case.
> Judge: That is immaterial and admonish the jury to disregard that answer and that question. Proceed.
> Mr. Patrick: May we approach the bench?
> Judge: No, sir.
> Mr. Patrick: For the record.
> Judge: Go ahead, the matter is closed.
> Mr. Patrick: I would like the record to reflect that I was not allowed to put in an objection.
> Judge: The record will also reflect that you have wasted entirely too much time, Mr. Patrick. (Trial Evidence, Vol. III, pp. 13-14.)

The Court sustained the prosecutor's objection to the questioning and admonished the jury. Thus, the jury was never shown the illicit relationship whi h existed between the deceased and the star witness for the prosecution. The Supreme Court of Kentucky held that this was not an error of constitutional magnitude. *Scruggs*, at 408.

During the trial, the trial court refused to allow the testimony of W. D. Weaver who was called as a witness on behalf of the defense, (TE, Vol. VIII, p. 81). Weaver was called to testify that the deceased had contacted him just prior to her disappearance about renting a house so that the family could have indoor plumbing. This was the same house where the petitioner claims he dropped his wife when he last saw her. It was not until the middle of the trial that the defense had learned of Weaver's knowledge of her visit to the house. The testimony was important as it would substantiate what the defendant himself would later say on the witness stand. Pursuant to RCr 9.48 for the separation of witnesses, the trial court refused to allow Weaver to testify citing that Weaver had been present during part of the trial proceedings. (TE, Vol. VIII, pp. 81-84.) The Supreme Court of Kentucky held that this was error but not of such weight as to constitute prejudice. *Scruggs,* at 410.

At the conclusion of the eight-day trial, the prosecutor delivered a willfully misleading and highly prejudicial summary argument. He told the jury:

> "Of course Mr. Scruggs would have you believe now he entertained the thought of pleading guilty to the murder of his wife when he didn't do it." (TE, Vol. IX, p. 44.)

There was no evidence presented that the accused ever entertained the thought or attempted to plead guilty and if such had been offered by the prosecution it clearly would have been inadmissible because of its

extraordinary prejudicial nature. Yet, the prosecution told the jury this in closing argument over the properly-taken objection of the defense. The objection was overruled, (TE, Vol. IX, p. 44). The jury was left to ponder as to what information the prosecutor had regarding this without any opportunity for the defense to show its falseness. The issue was raised on appeal and the Supreme Court of Kentucky held that the trial court rightly overruled the defendant's objection. *Scruggs,* at 412, 413.

REASONS FOR GRANTING THE WRIT

I.

This Court Should Grant Review to Determine Whether or Not the Error in Not Allowing the Accused to Cross-Examine a Key Witness as to His Motive for Testifying Was a Non-Prejudicial Error in Light of *Chapman* v. *California*.

The right of a defendant to confront a witness against him is a basic Sixth Amendment right, a fundamental right made obligatory on the states by the Fourteenth Amendment. *Pointer* v. *State of Texas,* 380 U. S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965).

One of the important objects of the defendant's right to confront a witness is to guarantee to the jury the opportunity to assess the credibility of the witness. *Barber* v. *Page,* 390 U. S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968). *Berger* v. *California,* 393 U. S. 314, 89 S. Ct. 541, 21 L. Ed. 2d 508 (1969).

If a defendant is not given the right to adequately cross-examine a witness against him, his constitutional

right of confrontation is violated. *Jenkins* v. *McKeithen,* 395 U. S. 411, 89 S. Ct. 1843, 23 L. Ed. 2d 404 (1969), reh den. 396 U. S. 869, 90 S. Ct. 35, 24 L. Ed. 2d 123.

Jerry Fann was not an uninterested witness to the murder. Rather he was a participant in the case, from at least the time of Martha's disappearance, throughout the entire investigation. More importantly, he was a suspect.

The defense was entitled to show Fann's involvement with Martha. The Supreme Court errs when it says that this constituted only a minute part of the impeachment effort because Fann's sexual relationship with the victim went to his very motive for testifying. Fann's sexual interests in this sordid episode would indicate, bias, prejudice and interest in the result of the trial. It would show a possible motive for Fann's involvement. Its exclusion denied the jury the only opportunity to properly weigh his testimonial credibility.

The defense tried to show throughout that the evidence introduced which tied the defendant Scruggs to the murder was also susceptible to a construction tying Fann to the crime. Much of the testimony pointed the finger of guilt at Fann. The only thing lacking was a motive. The possible motive for Fann was his passionate involvement with Martha. Since the Scruggses were apparently preparing to move into a new home together, Fann's sexual relationship with Martha would carry great probative value. When the Supreme Court of Kentucky says that the omission of this line of ques-

tioning was not prejudicial, it is in effect saying that excluding Fann's motive for the murder was not prejudicial. It is ludicrous to assert that omitting a suspect's intimate involvement with the victim in a murder trial was inconsequential.

The right to confront a witness against him is a basic Sixth Amendment right. The trial court's refusal to allow the effective cross-examination of Fann was a constitutional error of the first magnitude. Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. *Chapman* v. *California,* 386 U. S. 18, S. Ct. 824, 17 L. Ed. 2d 705, 24 A.L.R. 3d 1065 (1967). Certainly, the error committed by the trial court was not so unimportant and insignificant as to not affect the rights of the defendant.

Thus, the Kentucky high court's holding that the denial to question a key witness as to his motive for testifying is non-prejudicial is contrary to this court's holding that constitutional errors must be harmless beyond a reasonable doubt.

II.

This Court Should Grant Review Because the Holding That the Failure to Allow a Key Corroborating Defense Witness to Testify Was a Non-Prejudicial Error Conflicts With This Court's Holding in *Chapman* v. *California* Regarding Constitutional Errors.

The trial court refused to allow the testimony of W. D. Weaver for the defense, citing a violation of the rule for the separation of witnesses, even though the trial court did not invoke this rule to exclude prosecution witnesses. The Supreme Court of Kentucky held that the exclusion of the evidence was error "but the testimony was not of such weight to constitute prejudice." *Scruggs,* at 410.

The right of a defense to offer the testimony of witness is in plain terms the right to present a defense. This is a right which is a fundamental element of the due process of law. Just as an accused has a right to confront the prosecution witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses so that the jury may decide where the truth lies. *Washington* v. *State of Texas,* 388 U. S. 14, 19, 87 S. Ct. 1920, 1923, 18 L. Ed. 2d 1019 (1967). *In re: Oliver,* 333 U. S. 257, 273, 68 S. Ct. 499, 507, 92 L. Ed. 682 (1948). The right of accused to due process is in essence the right of a fair opportunity to defend against the State's accusations. The right to call witnesses in one's own behalf is essential to due process. *Chambers* v. *Mississippi,* 410 U. S. 291, 294, 93 S. Ct. 1038, 1045, 35 L. Ed. 297 (1973).

The petitioner asserted that he had dropped his wife off at a house owned by W. D. Weaver and never saw her again. The reason the couple was interested in renting the house was because it had indoor plumbing. The Commonwealth tried to show that the Petitioner had taken his wife directly to Fann's cave where he killed her. Weaver's testimony was the only evidence available to the defense that corroborated the Petitioner's testimony.

While it is impossible to calculate precisely the effect this testimony would have had on the jury, the fact that a leading respected citizen in the community testified that the victim arrived at his store soon before the alleged time of her death would have supported the defendant's case.

A constitutional error is harmless only if beyond a reasonable doubt it did not contribute to the defendant's conviction. *Chapman* v. *California,* 386 U. S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). In a murder trial as long and complicated as this, it is impossible to accurately state what factors caused a jury to decide one way or another. Clearly logic and some common sense indicate that the refusal to allow the only defense witness that could corroborate the Petitioner's defense was prejudicial error. Certainly the Supreme Court of Kentucky cannot state, and it did not state, that the error did not contribute to the defendant's conviction beyond a reasonable doubt.

Fundamental fairness and due process require:

> Judex bonus nigil ex arbitrio suo faciat, nec propositione domesticae voluntatis, sed juxta leges et jura pronunciet.

III.

This Court Should Grant Review to Determine Whether or Not the Kentucky Supreme Court Erred in Holding That the Trial Court Did Not Err in Overruling Objections to the Prosecutor's Argument That the Accused Had Entertained the Thought of Pleading Guilty.

For a prosecutor to convey, or even to permit, a false impression, invades the area of due process. *Miller* v. *Pate,* 386 U. S. 1, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967); *Napue* v. *Illinois,* 360 U. S. 264, 271, 272, 79 S. Ct. 1173, 32 L. Ed. 2d 1217. The law is universally clear that an accused offer to plead guilty cannot be used against him for a subsequent trial. *Bennett* v. *Commonwealth,* Ky., 28 S. W. 2d 24 (1930). To bring to the jury's attention purported facts that are not in evidence and are prejudicial goes beyond our limits to fair argument and fundamental justice. *Berger* v. *U. S.,* 295 U. S. 78, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935).

When the prosecutor in final argument told the jury that the defendant had entertained the thought of pleading guilty of the murder of his wife, he invaded one of the most cherished rights of a defendant. Under the Kentucky Rules of Court, the prosecutor closes argument with the defense having no opportunity for rebuttal. This case was close and the prosecutor may very well have placed the deciding factor into the jurors minds when he stated that the defendant had contemplated pleading guilty. To a lay juror deciding a close case, the fact that the defendant thought of pleading

guilty would surely move him toward believing the defendant was guilty, even though this court has ruled in *North Carolina* v. *Alford,* 400 U. S. 25 (1971), that a defendant may properly deny his factual guilt and still be allowed to plead guilty. Whether or not the prosecutor intended to purposefully prejudice the jury is not significant for the result is the same. That essential unfairness depriving the defendant of his constitutional rights to confrontation and due process of law occurred here is not merely a matter of speculation but is a demonstrated reality. *Buchalter* v. *New York,* 319 U. S. 427, 431, 63 S. Ct. 1129, 87 L. Ed. 2d 1492; *Donnelly* v. *DeChristoforo,* 416 U. S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974). The prosecutor's comments amounted to inflammatory reckless overkill so great that constitutional proportions were reached.

Before constitutional error can be held harmless, it must be proved beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *Chapman* v. *California, supra.* The holding of the Supreme Court of Kentucky that this was not prejudicial closing argument denied the defendant his rights to a fair trial under the Sixth and Fourteenth Amendments of the Constitution.

CONCLUSION

For the reasons detailed above, individually and collectively, this Court should grant this petition for a writ of certiorari to review the judgment and opinion of the Supreme Court of Kentucky.

Respectfully submitted,

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APPENDIX

APPENDIX A

SUPREME COURT OF KENTUCKY

No. SC-288-MR

RENDERED: APRIL 11, 1978

THOMAS LLOYD SCRUGGS - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Allen Circuit Court
Honorable Frank Goad, Judge
Indictment No. 6026

OPINION OF THE COURT BY JUSTICE STERNBERG—AFFIRMING

On February 5, 1976, the Grand Jury of Allen County, Kentucky, returned an indictment against the appellant for "the offense of murder by shooting Martha Louise Scruggs with a high powered rifle." KRS 507.020(1)(a). After an eight-day trial the appellant was found guilty of murder and his punishment fixed at 20 years' imprisonment. On this appeal the appellant claims sixteen prejudicial errors.

James and Martha Scruggs had been married for twelve years and had four children, ages 12, 11, 10 and 6. They lived on a farm in the "Settle" community of Allen County, Kentucky. Their married life was not one of comfort and bliss, but rather was a bed of thorns and turmoil. They had separated on more than one occasion, once in the summer of

1975 for about three months. Each of them was finding more pleasure in the company of others, Martha with her paramour and the appellant with his girlfriend. On July 3, 1975, Martha filed a suit for divorce. However, the parties were reconciled in September, 1975, and the divorce suit was dismissed on September 22, 1975. On December 2, 1975, Martha went to her lawyer's office to reinstate her divorce suit, and on December 3, 1975, she disappeared and was not seen thereafter until her dead body was found in a cave on December 14, 1975.

Appellant's first complaint is that the trial judge, in limiting his interrogation of the chief Commonwealth witness Jerry Fann, violated his constitutional right of confrontation. Fann was called as a Commonwealth witness and his presence and participation are evident from the time of Martha's disappearance to the conclusion of the trial. It was Fann who found the victim's corpse. It was Fann who located a tree that had been split by a shot from a high-powered rifle. Fann owned and was in possession of the rifle that was proven to be the murder weapon. Fann was the victim's lover. In an attempt to impeach Fann's testimony, counsel for appellant inquired as to Fann's relationship with the victim. Specifically, counsel asked Fann whether he and the victim had ever engaged in sexual intercourse. At this point the Commonwealth objected, but before the court could rule on the subject Fann responded to the query in the affirmative. The court then sustained the objection and admonished the jury to disregard the witness' answer. From these basic facts the appellant asserts that his constitutional right to confrontation was abridged.

A cursory examination of the record shows this supposition to be without merit. Counsel for appellant conducted an exhaustive cross-examination, consuming over 35 pages in the record. Counsel effectively exposed Fann's relationship to the appellant and to the victim. In a recent opinion this court refused to recognize a Sixth Amendment violation of the right to confrontation when an eyewitness for the prosecution declined to answer a question on cross-examination that was intended to impeach his powers of observation. Kendricks v. Commonwealth, Ky., 557 S. W. 2d 417 (1977). The failure of a trial court to admit into evidence one question and answer that is designed to impeach a witness will not give rise to an error of constitutional magnitude, absent unusual circumstances. Assuming arguendo that the proposed question was within the scope of cross-examination, we do not think the denial to ask such a question was prejudicial since it constituted only a minute part of the impeachment effort.

The appellant's second assignment of error also concerns the attempt by counsel to impeach the testimony of Jerry Fann. Fann had been convicted of auto theft some seventeen years prior to the trial of this case. The appellant sought to introduce evidence of this prior felony conviction, but was prohibited from doing so by the trial court. Normally this type of impeachment is proper; however, we observed in Cotton v. Commonwealth, Ky., 454 S. W. 2d 698 (1970), that the trial court may exclude evidence of prior convictions if the court deems the conviction so remote as to have no bearing on credibility. The appellant asserts that remote felony convictions are subject to exclusion only when the defendant is testifying and that the rule is not applicable to other witnesses. We recognize that the danger of prejudice may be unusually acute when the accused has taken the stand in his own behalf; nevertheless, the rule applies evenhandedly to all witnesses. Bell v. Commonwealth, Ky., 520 S. W. 2d 316 (1975). Since the rule was properly applied in this case, there is no error, absent an abuse of judicial discretion. Our examination of the record shows no such abuse.

Appellant's third and fourth assignments of error are predicated upon the assertion that Marlene Shields, secretary to the victim's attorney, was allowed to testify to

matters that should have been excluded under the hearsay rule. The record shows that counsel for the appellant withdrew his objection and thus this matter is not preserved for review. RCr 9.22; Bell v. Commonwealth, Ky., 473 S. W. 2d 820 (1971).

For his fifth assignment of error the appellant claims that the trial court improperly allowed into evidence threats against the victim attributed to the appellant and made approximately seven months prior to the disappearance of the victim. It is the appellant's contention that this evidence was so remote as to have no probative value.

A party was given by Jerry Fann in either May or August, 1975, to which Thomas and Martha were invited and were in attendance. Martha became staggering drunk and appellant made two threats against her life. In the presence of several women, but not in the hearing of Martha, he said, "* * * well I am getting rid of her; one way or the other I am going to get rid of her." The other threat was, "* * * I am going to kill that bitch. One way or the other I am going to kill her, I am going to kill her * * *."

We cite, with approval, 29 Am. Jur. 2d, Evidence, Sec. 253, at page 305, wherein it says:

> "* * * However, that a fact is remote in point of time or probative value does not of itself preclude its admissibility, but its admissibility depends to a large extent on the nature and circumstances of the case, and rests largely in the discretion of the trial court. Where evidence relates to matters too remote in point of time or to matters too far removed from the scene of the transaction, it is not admissible. In effect, the objection that evidence is too remote goes to the credibility of the evidence rather than to its admissibility, unless the remoteness is so great that the proffered evidence has no probative value at all."

We believe this evidence to be competent and, as such, we do not believe that it was so remote as to mandate exclusion. Shumate v. Commonwealth, Ky., 433 S. W. 2d 340 (1968).

Next, the appellant asserts that the trial court erred by excluding statements allegedly made by the victim on the weekend prior to her disappearance. By way of avowal we are informed that the witness, if allowed to testify, would have stated that the victim had said she would leave her husband and would take no belongings other than the clothes on her back. Also, the appellant argues that the court erroneously prohibited the introduction of the contents of a note which the victim had allegedly written. The appellant testified that on the day of Martha's disappearance he returned home from a trip to Scottsville, Kentucky, and found a note which she had written to him, which allegedly said that she had gone to Nashville, Tennessee, with friends. At the time of the trial the note was reported to have been lost; at least it was not produced at the trial.

The court ruled that evidence relating to the statements allegedly made by the victim on the weekend prior to her disappearance and evidence relating to the contents of the note were hearsay and refused to permit any testimony relating thereto to be introduced. The note, if actually there was such a note, at the most would indicate an intention to go to Nashville. Any other inference would be highly speculative. Assuming that the note did exist and that its contents did express an intention on the part of Martha to go to Nashville and further assuming that the appellant was telling the truth about the note, there is no proof that Martha did go to Nashville, only appellant's testimony that he had a telephone conversation with her in which she said she was in Nashville, thereby lifting himself by his own bootstraps.

Declarations which declare an intent to do a particular thing have been deemed admissible as an exception to the

hearsay rule where they possess a high degree of trustworthiness, where they are relevant to an issue in the case, and the declarant is dead or otherwise unavailable. Todd v. Commonwealth, Ky., 511 S. W. 2d 239 (1974). In the instant case the verbal statements and the contents of the written note were hearsay. To be admissible they must come within the exception to the hearsay rule. In 29 Am. Jur. 2d, Evidence, Sec. 651, it is stated, and was quoted in Todd v. Commonwealth, supra:

> "Where the intent with which a party performed an act is a disputed fact in a case or a material element of such a fact, declarations made by the party after, as well as before, such act, that indicate the intent with which he performed it, are admissible in evidence as an exception to the hearsay rule. However, such a declaration of intent is not admissible in the absence of the act to which it relates, * * *."

In the instant case the person making the statements and writing the note is dead and certainly not available. The evidence does not establish the oral or written statements of the decedent to possess a high degree of trustworthiness nor are the statements shown to be relevant to the guilt or innocence of the appellant of the murder of his wife. Neither the statements made by the victim on the weekend prior to her disappearance nor the contents of the note comes within the exception to the hearsay rule. Both were properly excluded.

Next, the appellant charges that the trial court erred by refusing to allow Jeanetta Scruggs, the appellant's daughter, to testify concerning the contents of the missing note. The appellant argues that he was prohibited from placing an avowal into the record and that therefore we must reverse this case for a new trial. Once again the facts gleaned from the record do not bear out the appellant's argument.

The transcript of Jeanetta Scruggs' testimony shows that counsel for appellant asked the following question, "At any time that day did your father say anything to you about a note?" The witness replied, "I don't remember." Thus the question was asked by counsel and answered by the witness. Since the appellant's counsel received a definitive answer to the question he propounded, we fail to see merit in the argument that an avowal should have been allowed as a matter of right. We find no error here.

The appellant contends, for his ninth assignment of error, that Damon Kirby was improperly allowed to serve as a juror in this case. An extensive voir dire of Kirby was conducted by counsel. In fact the examination by the defense consumes approximately fourteen pages in the record. In support of this challenge the appellant, in his brief, says that Kirby "also stated that he had discussed the case with a chief prosecution witness, Jerry Fann." The record does not reveal that this happened. The record does not disclose that the juror, Damon Kirby, was merely present with other persons on an occasion when Fann was just talking about the incident. There was no direct dialogue between Jerry Fann and Damon Kirby. It appears from the transcript of testimony that the trial judge, after carefully examining the facts, concluded that it was clear and convincing that this juror could and would decide the issues without any preexisting convictions of appellant's guilt.

Assuming arguendo that this matter had been properly preserved for appellate review, we note that a trial judge has a certain amount of discretion in such matters. Pennington v. Commonwealth, Ky., 455 S. W. 2d 530 (1970). Unless clearly erroneous, the exercise of such discretion is a judicial prerogative and is not subject to review by an appellate court.

Next, the appellant contends that the trial court erroneously applied RCr 9.48 and thus prejudiced the appellant

and abused its discretion. We disagree. That rule provides as follows:

> "If either a defendant or the commonwealth requests it, the judge may exclude from the hearing or trial any witness of the adverse party not at the time under examination, so that he may not hear the testimony of the other witnesses. This provision shall not apply to the parties to the proceeding."

Pursuant to RCr 9.48, the court refused to allow W. D. Weaver to testify for the defense since he had been present during some, if not all, of the proceeding. We hold that this was error but the testimony was not of such weight as to constitute prejudice.

Also, it is the contention of the appellant that the rule was improperly applied to Sheriff Minix who testified for the prosecution. However, in Jaggers v. Commonwealth, Ky., 439 S. W. 2d 580 (1969), we held that, "It is well settled that the trial court in the exercise of proper discretion may permit a witness to testify even though the separation rule has not been observed." We find no abuse of discretion.

Jerry Fann and Donnie Finn were also subject to the rule and its ramifications. Fann testified first and was admonished not to discuss his testimony, but he ignored the admonition and spoke with Finn. The appellant requested that Finn's testimony be excluded. The court allowed Finn to testify and also allowed the appellant's counsel sufficient latitude to expose the improper dialogue between the two men to impeach Finn's credibility. Under the circumstances we find no abuse of discretion by the court. The interrogation disclosed that Fann had talked to Finn, but it does not disclose what was said by either of the parties pertaining to the action.

The next assignment of error by appellant concerns the excluded testimony of Thomas Scruggs, Jr., the appellant's 11-year-old son. The court held an in-camera interrogation of the witness in the presence of counsel, but for some inexplicable reason the hearing was not reported. Consequently, there is no transcript of the dialogue. The trial judge determined not to permit the witness to testify for two reasons, as follows:

> "Number one: Last evening approximately fourteen hours prior to this very moment the Court interviewed this boy and his sister in the presence of all counsel as stated. It was obvious at the time that this child did not have any mental direction of his own. That his opinions were merely reflections of what had been said to him. The child demonstrated complete lack of emotional stability which was confirmed approximately twenty minutes after this child left the chambers when he had a seizure or black out and fell to the floor in the presence of the Welfare worker, Mrs. Suzanne Pardue, Scottsville, Kentucky.
>
> Number two: It is beyond the Court's view of value that the opinion of this child as to the mental reaction of his elders could be competent or accurate. It is blatantly obvious to the court that the statement taken from this child was taken under conditions of excitement and would, if anything, be misleading to the jury. The other reason the Court has for excluding this testimony is that it is believed that an appearance by this child in Court would be a permanent traumatic emotional experience for him and the Court has been strongly urged by those who have had this child in custody for the past several months not to permit this type testimony and the duress which would accompany it. Lastly, this testimony which would be offered by the child is cumulative and grossly repetitious. The

court can conceive of no need for further or additional reasons for its ruling. * * *."

Thus it appears to us that the trial judge carefully examined the minor and determined that the child should not be permitted to testify. Hendricks v. Commonwealth, Ky., 550 S. W. 2d 551 (1977). The record does not reflect an abuse of discretion in this instance.

The next claim of error concerns a procedural ruling handed down by the trial judge in regards to the appellant's counsel. The record reveals that the appellant had three attorneys present in the courtroom during the trial and the Commonwealth had two. In an attempt to facilitate an orderly trial, the court ruled that any one of the attorneys could question a witness, but that once questioning had begun the other attorneys were to ask no questions nor were they to raise any objections until that witness was excused. There was no inhibition to all three defense counsel conferring at any time. We find this innocuous procedure to be a valid precautionary measure designed to assure an orderly trial and a coherent transcript. In all cases the circuit courts may regulate their practice in any manner not inconsistent with the criminal or civil rules of procedure. CR 83. Also, we observe that no objection was offered to this procedural rule. Thus this matter is not preserved for appellate review. RCr 9.22.

Next, the appellant asserts that the comments of the trial judge directed toward counsel for the apellant were prejudicial. We take judicial notice that an eight-day murder trial in which the Commonwealth was represented by two attorneys and the defense by three attorneys will be taxing not only upon counsel but upon the trial judge as well. Although there are disparaging comments of the court directed at both counsel for the Commonwealth and counsel for the appellant, we do not consider the cumulative

effect of the comments to be prejudicial to the appellant. Abernathy v. Commonwealth, Ky., 439 S. W. 2d 949 (1969).

The appellant next charges that the sheriff and the trial judge improperly communicated with the jury after it had retired to the jury room. The record reflects that after about five hours of deliberating the jury advised the sheriff that it needed to confer with the judge. The trial judge, who was in close proximity but not in the jury room, told the jury that he could not help it. This is the only communication that occurred, but counsel for the appellant would have this court condemn the action of the trial court and reverse the action. Counsel for the appellant raised no objection in a subsequent dialogue with the court concerning this matter. On the contrary, counsel commented to the trial court as follows, "Well I think the court has been extremely careful all through the trial." No error has been pointed out to this court.

For his fifteenth assignment of error the appellant submits that the evidence adduced by the prosecution in this case cannot justify a verdict of guilty beyond a reasonable doubt. We have carefully perused the record and are unable to locate the appellant's motion for a directed verdict at the end of his case in chief or at the conclusion of all of the evidence. This issue must be presented to the trial judge and he be afforded an opportunity to review and correct his action if he deems it appropriate. For example, at the conclusion of the Commonwealth's evidence in chief, the defendant may make a motion for the court to direct a verdict of acquittal. In the event the motion is granted, then the charges will be dismissed. On the other hand, if the motion is denied, then, and in that event, the defendant must either stand on his motion and refuse to put on any proof or he may present his evidence to support his defense. At the conclusion of the defendant's case, he must renew his motion for a directed verdict of acquittal. In the event the motion is granted, the charges will be dismissed. On the

other hand, if the motion is denied, then the Commonwealth must proceed to put on its rebuttal evidence, if any, and at its conclusion the defendant must again renew his motion for a directed verdict of acquittal. In each such instance the trial judge would have been afforded an opportunity to pass on the propriety of the motion. This is essential, not only essential but mandated by RCr 9.54.

During the closing argument of the Commonwealth's Attorney he expressed his personal opinion of appellant's guilt. This was improper conduct. However, in this instance we do not consider this impropriety to be of such magnitude as to require reversal. In any event, no objection was made; consequently, the issue was not preserved for appellate review.

The Commonwealth's Attorney was properly permitted to remind the jury that the victim, on December 2, 1975, went to her lawyer's office to reinstate her divorce action, which action was confirmed by the secretary to Mrs. Scruggs' attorney. This evidence supports the argument of the Commonwealth's Attorney.

Counsel for the appellant rightly objected to the Commonwealth's Attorney's charge that the appellant stole the murder weapon. However, this was corrected by the Commonwealth's Attorney with apologies. No admonition was sought by counsel for appellant and none was given.

Appellant's counsel charges the Commonwealth's Attorney with misstating testimony relating to the method employed by the Commonwealth in ascertaining suspects, the purpose for which Donnie Finn and Jerry Fann were together when they discovered the body of Mrs. Scruggs, the comments of appellant relating to his guilt (that the Commonwealth would have to prove that he committed the offense), the reference to the number of witnesses used by the Commonwealth and the insignificance of their testimony, and the report of the autopsy. The conclusions

enunciated by the Commonwealth's Attorney in these respects are not in conflict with the testimony. The court rightly overruled appellant's objection.

The judgment is affirmed.

All concur.

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APPENDIX B

SUPREME COURT OF KENTUCKY

OPINION RENDERED APRIL 11, 1978

THOMAS LLOYD SCRUGGS
v.
COMMONWEALTH OF KENTUCKY
File No. SC-288-MR

Appeal from Allen Circuit Court
Action No. 6026

MANDATE—Issued May 23, 1978

The Court being sufficiently advised, it seems there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

May 23, 1978 Appellant's Petition for Rehearing Denied.

A Copy—Attest:
(SEAL)

(s) Martha Layne Collins, Clerk

Issued: May 23, 1978

Supreme Court, U. S.
FILED
SEP 14 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-272

THOMAS LLOYD SCRUGGS - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

On Petition for Writ of Certiorari to the
Supreme Court of Kentucky

BRIEF FOR RESPONDENT IN OPPOSITION

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STATEMENT OF THE QUESTIONS PRESENTED

I. **Whether the Kentucky Supreme Court erred in finding that petitioner had not been substantially prejudiced by the trial court's refusal to permit him to cross-examine a prosecution witness as to his motive for testifying?**

II. **Whether the Kentucky Supreme Court erred in finding that petitioner was not substantially prejudiced by the trial court's refusal to permit petitioner to introduce the testimony of an allegedly corroborating witness?**

III. **Whether the prosecutor's comment during summation to the jury that petitioner had entertained the thought of pleadng guilty violated federal constitutional rights?**

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-272

THOMAS LLOYD SCRUGGS - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The Opinion Below from the Kentucky Supreme Court is reported at *Scruggs* v. *Commonwealth,* Ky., 566 S. W. 2d 405 (1978). The respondent adopts the facts as set out in that Opinion by that court. That Opinion is also correctly set out in the Appendix of the Petition for Writ of Certiorari.

JURISDICTION

Petitioner's application to invoke the jurisdiction of this Court should be denied because it fails to meet the jurisdictional requirements of 28 USC § 1257(3).

The Petition for Writ of Certiorari is predicated upon the following three contentions: (1) Whether the Kentucky Supreme Court erred in finding that the petitioner had not been substantially prejudiced by the trial court's refusal to permit him to cross-examine

Jerry Fann, a prosecution witness, as to his motive for testifying, or, (2) By the refusal of the trial court to allow an allegedly key corroborating defense witness, W. D. Weaver, to testify, and (3) Did the Kentucky Supreme Court fail to recognize error of federal constitutional proportions with regard to a comment made by the prosecutor in summation as to the fact that the petitioner had entertained the thought of pleading guilty? The respondent respectfully disagrees with each of the foregoing contentions and submits that none of them establish a basis upon which to exercise the discretionary application of this Court's power by writ of certiorari.

(I. and II.) In his Petition for Rehearing before the Kentucky Supreme Court and now, in his Petition for Writ of Certiorari before this Court, petitioner steadfastly maintains that the Kentucky Supreme Court's finding that the petitioner had not been substantially prejudiced by the errors committed by the trial court conflicts with this Court's holding in *Chapman* v. *California,* 386 U. S. 18 (1967).[1] The respondent respectfully disagrees.

What the petitioner fails to recognize is that the Kentucky Supreme Court applied its *state rule* as to these issues with respect as to whether the petitioner had been *substantially* prejudiced by the trial court's errors. RCr 9.24; RCr 9.26. The standard in Kentucky for determining whether prejudice to the accused is so great as to require reversal of his conviction:

[1]Also see, *Harrington* v. *California,* 395 U. S. 250 (1969).

whether, upon a consideration of the whole case, there is a substantial possibility that the result would have been any different had the error not occurred. *Abernathy* v. *Commonwealth,* Ky., 439 S. W. 2d 949 (1969); *Edwards* v. *Commonwealth,* Ky., 554 S. W. 2d 380, 384 (1977); and *Richardson* v. *Commonwealth,* Ky. App., 559 S. W. 2d 738 (1978).

Obviously, with respect to the application of the harmless error rule, the Kentucky Supreme Court was ruling on a matter of state law and therefore its ruling, with respect to contentions one and two as presented by the petitioner in the instant petition, cannot now be made a matter for review by certiorari before this Court. *Barrington* v. *Missouri,* 205 U. S. 483 (1907). After all, this Court has repeatedly indicated that it will not review by certiorari state court judgments which, as here, rest upon adequate state grounds. *Hammerstein* v. *Superior Court of California, in and for Los Angeles County,* 340 U. S. 622 (1951). This is true notwithstanding the court co-presence of federal grounds presented in the state courts. *Henry* v. *Williams,* 299 F. Supp. 36 (N.D. Miss. 1969). Accordingly, the respondent respectfully submits that this Court lacks jurisdiction to review the issues now presented. *Missouri Pacific Railroad Company* v. *Hannah,* 266 U. S. 184 (1924).

Secondly, the respondent urges that this Court is without jurisdiction to consider the first two contentions raised in the petition because neither of those contentions present an issue of such substance as would authorize, much less require, that the discretionary

jurisdiction of this Court be exercised. *Department of Mental Hygiene* v. *Kirchner,* 380 U. S. 194 (1965); *Cardinale* v. *Louisiana,* 394 U. S. 437 (1969). For example, petitioner's basic complaint as to his inability to "confront" prosecution witness Fann is rendered specious under the trial record where, as noted by the Kentucky Supreme Court, petitioner had the advantage of a lengthy cross-examination of Fann (TE, Vol. III, pp. 10-45). Moreover, the fact that the trial court refused to permit petitioner to cross-examine Fann as to the extent of his sexual relationship with the deceased is not of sufficient import, in light of the record, to have substantially prejudiced petitioner's right to a fair trial. The petitioner's other contention dealing with the refusal of the trial court to permit him to examine a W. D. Weaver because of an apparent violation of the Kentucky rule of separation of witnesses (RCr 9.48) is also without constitutional magnitude. What Weaver would have testified to was not as such substance as would have substantially prejudiced the petitioner (TE, Vol. VII, pp. 82-83). Clearly, the foregoing issues do not arise under such exceptional circumstances as to require this Court to review the decision of the Kentucky Supreme Court. Supreme Court Rule 19.

(III.) The petitioner's final contention as to an impermissible comment made by the prosecutor in his summation to the jury was not even mentioned by the Kentucky Supreme Court in its Opinion.[2] The comment was as follows:

[2]For that matter, this issue was not presented by the petitioner in his Petition for Rehearing to the Kentucky Supreme Court.

> "Of course, Mr. Scruggs would have you believe now he entertained the thought of pleading guilty to the murder of his wife when he didn't do it" (Vol. IX, p. 44).

This statement is nothing more than a reasonable comment on the evidence (TE, Vol. VI, pp. 16-17). Thus, it is the position of the respondent that the above quoted comment does not present a substantial federal constitutional issue and therefore presents no basis for discretionary exercise of this Court's grant of petition for writ of certiorari. Supreme Court Rule 19.

SUMMARY

For the foregoing reasons, the respondent respectfully submits that the application for petition for writ of certiorari should be denied because: (a) the decision of the Kentucky Supreme Court rests upon matters of state law, and (b) a substantial federal question is not presented by any of the three issues raised by the petitioner.

Respectfully submitted,

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PROOF OF SERVICE

I, Patrick B. Kimberlin, III, a member of the bar of the Supreme Court of the United States, hereby certify that three copies of this Brief for Respondent in Opposition have been mailed, first class postage prepaid, this 12th day of September, 1978, to Hon. Robert E. Harrison, Public Square, Graves Building, P. O. Box 522, Scottsville, Kentucky 42164, Counsel for Petitioner.

Patrick B. Kimberlin, III

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